केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते केंद्रीय उत्पाद शुल्क भवन, 7th Floor, Central Excise Building,

सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,

आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015

☎ : 079-26305065 टेलेफैक्स : 079 - 26305136

रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.) : **V2(31)145 & 146 /Ahd-II/Appeals-II/ 2016-17** /10076 to 10081

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP- 145-146-17-18**

दिनांक (Date): **27.10.2017** जारी करने की तारीख (Date of issue): 27-11-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** , Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-III), अहमदाबाद- II, आयुक्तालय द्वारा जारी मूल आदेश सं---------- दिनांक _----------से सृजित

Arising out of Order-In-Original No ._**41-42/JC/2016/GCJ**__**Dated: 19.01.2017** issued by: Joint Commissioner Central Excise (Div-III), Ahmedabad-II

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s Shri Jayantibhai Mohanbhai Kumbhani(Sikko Industries)

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है |

Any person an aggrieved by this Order-in-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way:

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India:

(1) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी चाहिए |

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

(ii) यदि माल की हानि के मामले में जब हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार में हो माल की प्रकिया के दौरान हुई हो |

In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है |

Cont...2

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गत:–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

(a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

(ख) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016.

(b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से

रेखाकिंत बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस सन्दर्भ में इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

M/s Sikko Industries Ltd., 508, 'Iscon Eligance', Near Jain Temple, Near Prahladnagar Pick-up stand, S.G. Highway, Vejalpur Ahmedabad -380 051 (hereinafter referred to as 'the appellant') has filed the present appeal against **Order-in-original No.41-42/JC/2016/GCJ dated 19/01/2017** (hereinafter referred to as 'the impugned order') passed by Joint Commissioner, Central Excise, Ahmedabad-II (hereinafter referred to as 'the adjudicating authority'). The appellant is engaged in the manufacture of NPK Fertilizers, Organic Fertilizers and Sea-weed based fertilizers falling under Chapter 31 of the first schedule to the Central Excise Tariff Act, 1985 (CETA, 1985) and Soil Conditioners falling under Chapter 38 of CETA, 1985 at its manufacturing unit situated at Survey No. 192/2 86 193/2, Ambica Estate, At: Ivaya, Taluka: Sanand, Ahmedabad and the manufactured products were cleared under the brand name 'SIKKO'. The appellant was not registered with Central Excise. Acting on intelligence that the unit was clearing excisable product namely Soil Conditioners in the guise of fertilizers and Bio-fertilizer to avail the benefit of Notification No. 01/2011-CE dated 01/03/2011 (till 17/03/2012) and Notification No. 12/2012-CE, as amended dated 17/03/2012, the officers of Central Excise conducted simultaneous searches on 08/01/2014 at the factory premises and Head office of the appellant as well as at the Godown premises of the appellant's sole distributor i.e. M/s Sikko Trade Link Pvt. Ltd. situated at 95,96,97 86 182, Sahjanand Estate, Near Bhavani Motors, Ahmedabad under Panchnama proceedings. During the search at the factory premises, certain documents / records were withdrawn and four representative samples of finished products i.e. Best Agri Product (BAP), Sikko Gold, Bio Star, Sikko Power, Macros, NPK 20:20:00, NPK 12:32:06 and White Gold were withdrawn in the presence of Panchas.

2. Subsequently on the basis of investigations and statements of Shri Jayantibhai M. Kumbhani, Managing Director of M/s Sikko Industries (Fertilizer Division), a **Show Cause Notice F.No.V.38/15-20/OA/2016 dated 29/02/2016** was issued to the appellant proposing to classify Soil Conditioners / Plant growing Media Sikko Gold, Sikko Power, Bio Star, Sikko Power and Best Agri Product (B.A.P.) cleared by the appellant in guise of fertilizer under CTHSH 38249090 instead of CETH 31052000 / 31051000 and proposing to deny the benefit of concessional rate of duty under Notification No. 01/2011-CE as amended on 01/03/2012 and Notification No. 12/2012 dated 17/03/2012; proposing to classify the product Vasool and Surya Black (in packaging of 10kgs or less) under CETSH 31051000 of CETA, 195 instead of CETSH 31010099 classified by the appellant; proposing to classify the product Vakil 3D being larvacide / pesticide under CETSH 38089910 of CETA, 1985 instead of CETSH 31010099 classified by the appellant; demanding Central Excise duty of **Rs.1,69,60,164/-** for the period **2011-12 to 2014-15** under Section 11A(4) of the Central Excise Act, 1944 (CEA, 1944) and proposing to appropriate an amount of Rs. 1,62,74,084/- paid under protest;

proposing to levy interest under Section 11AA of CEA, 1944 and appropriate an amount of Rs.6,01,444/- paid under protest; proposing to confiscate excisable goods valued at Rs.23,13,03,552/- under Rule 25(1) of CER, 2002 and proposing to impose penalty on the appellant under Rule 25(1) of CER, 2002 read with Section 11AC(1)(d) and 11AC(1)(e). In this SCN, penalty was proposed to be imposed on Shri Jayantibhai M. Kumbhani, Managing Director of the appellant, M/s Sikko Industries (Fertilizer Division) under Rule 26 of CER, 2002.

3. Another **Show Cause Notice F. No. V.31/3-22/D/14 dated 19/06/2014** was also issued to the appellant proposing to confiscate fully finished goods weighing 327850 kgs valued at Rs.22,84,396/- involving Central excise duty of Rs.2,82,353/-, seized under Panchnama dated 08/01/2014 in terms of Notification No. 68/63 CE dated 04/05/1963 as amended; demanding Central Excise duty of Rs.2,82,352, on such goods under Section 11A(1) of CEA, 1944; Proposing to impose penalty on the appellant under Section 11AC of CEA, 1944; proposing to impose penalty under Rule 25 of CER, 2002 and proposing to dispose off the seized goods as per the provisions of Rule 29 of CER, 2002 or impose a fine in lieu of confiscation. Personal penalty was proposed to be imposed on Jayantibhai M. Kumbhani, Managing Director of the appellant under Rule 26 of CER, 2002.

4. In the impugned order, the adjudicating authority has decided the Show Cause Notice F.No.V.38/15-20/OA/2016 dated 29/02/2016 by ordering the classification of Soil Conditioners / Plant growing Media Sikko Gold, Sikko Power, Bio Star, Sikko Power and Best Agri Product (B.A.P.) under CTHSH 38249090 instead of CETH 31052000 / 31051000 and denied the benefit of concessional rate of duty under Notification No. 01/2011-CE as amended on 01/03/2012 and Notification No. 12/2012 dated 17/03/2012. The adjudicating authority has classified the product Vasool and Surya Black (in packaging of 10kgs or less) under CETSH 31051000 of CETA, 195 instead of CETSH 31010099 classified by the appellant.; The adjudicating authority has classified the product Vakil 3D being larvacide / pesticide under CETSH 38089910 of CETA, 1985 instead of CETSH 31010099 classified by the appellant. The demand of Central Excise duty of **Rs.1,69,60,164/-** for the period **2011-12 to 2014-15** has been confirmed under Section 11A(4) of the Central Excise Act, 1944 (CEA, 1944) and proposing to appropriate an amount of Rs. 1,62,74,084/- paid under protest has been appropriated after vacating the protest.. The demand for interest has been confirmed under Section 11AB / 11AA of CEA, 1944 and an amount of Rs.6,01,444/-/- paid by the appellant has been appropriated after vacating protest. A penalty of Rs.84,80,082/- has been imposed on the appellant under Section 11AC(1)(e) and an amount of Rs.10,68,521/- and Rs.73,13,920/- already paid under protest has been appropriated. The adjudicating authority has imposed a personal penalty of Rs.25,00,000/- on Shri Jayantibhai M. Kumbhani, Managing Director of the appellant.

5. In the impugned order, with respect of SCN F.No.V.31/3-22/D/2014 dated 19/06/2014, the adjudicating authority has confiscated goods valued at Rs.22,84,396/- under Rule 25(1) (d) of CER, 2002 that were placed under seizure vide panchnama dated 08/01/2014 and imposed redemption fine of Rs.5,71,100/- in lieu of confiscation. The demand for Central Excise duty amounting to Rs.2,82,353/- has been ordered to be recovered as and when the impugned goods are cleared from the factory premises.

6. Aggrieved by the impugned order, the appellant has filed appeal, chiefly, on the following grounds:

1) The department has classified **N.P.K.20:20:20, N.P.K.20:10:10, N.P.K.12:32:06** under Chapter Heading 31052000 and has demanded duty of Rs.5,37,353/- for the period 2011-12 to 2014-15. The duty amount of Rs.2,96,730/- stand paid already at the time of clearance of the product from 05/07/2014 onwards. The learned adjudicating authority in para 66.7.16 of the impugned order has held that it was only an arithmetical totaling error and the correct figure is Rs.2,18,427/- in place of Rs.2,12,065/- for the year 2012-13. The appellant is not contesting the small differential amount of Rs.6,362/-, it strongly pleads that the demand of Rs.5,43,715/- is time-barred as there was no willful non-declaration or mis-declaration or suppression of any fact by the appellant.

2) The department has issued demand of Rs.38,109/- classifying **Vasool** under Chapter Heading 31051000. The appellant was always under *bona fide* belief that the product being manufactured from Sea Weed Extract was classifiable as Vegetable Fertilizer falling under CTSH 31010099. The Chemical Examiner in his test report dated 03/06/2015 has not found any discrepancy in the description of the product declared by the appellant. Of course, there had been a *bona fide* mistake on part of the appellant in interpreting CTSH 31051000. However, the demand of Rs.38,109 is time-barred as there was no willful non-declaration or mis-declaration or suppression of any fact by the appellant. The learned adjudicating authority has held that since the appellant was not showing the packing in which various fertilizers were cleared, the appellant had mis-declared and mis-classified the goods to avail benefit of exemption notification. The case laws such as Cosmic Dye Chemical V. Collector of Central Excise, Bombay – 1995 (75) ELT 721 (SC); Collector of Central Excise v. Champhor Drugs & Liniments – 1989 (40) ELT 278 (SC); CC&CE, Hyderabad-IV v. ITW Signode (India) Ltd. – 2015 (322) ELT 699 and Janta Rubber Distributors v. CCE, Calcutta-I – 2000 (125) ELT 671 (Tribunal) have not been discussed in the impugned order and thus it is bad in law and liable to be set aside.

3) With regards to **Black Surya**, the department has demanded duty of Rs.9,994/- on Amino Acid Fertilizer imported by the appellant on payment of appropriate Custom duty, which was merely repacked by classifying it under CTSH 31051000 on the basis of statement dated 07/09/2015 of the Director, stating that the product was classifiable under Chapter 31 of CETA, 1985. The department has held that since products of Chapter 31 in any packaging not exceeding gross weight 10kgs are classifiable under CTSH 31051000, duty is chargeable on these products @1%. It should be abundantly clear that this classification would have been applicable only if these goods were manufactured in India. The statement of the Director under misconception of the legal status of the goods, cannot have the effect of making duty-paid imported goods leviable again to Central Excise duty. The Hon'ble Supreme Court I the case of UOI v. Delhi Cloth Mills Co. Ltd.-1977 (1) ELT (J199) (SC) have held that manufacture means bringing into existence a new substance and is end result of one or more processes through which original commodity passes. In the case of Northern Minerals Ltd. v. CCE, New Delhi – 2001 (131) ELT 355 (Tri.-Del.) dealing with

similar situation has held that in the absence of any Chapter Note in Chapter 31 creating a legal fiction that repacking of bulk products into smaller packings amounted to manufacture, repacking activity cannot be held to be a process of manufacture within the meaning of Section 2(f) of CEA, 1944 as this activity did not bring into existence any commodity different in character, use or commercial identity from the bulk products. The demand is also time-barred.

4) As regards **Vakil-3D**, the department has raised demand of Rs.3,54,603/- erroneously assuming that the product is a Larvicide / Herbal Pesticide + Fungicide + Bio Stimulant classifiable under CTSH 38089910 of CETA, 1985. The product is basically a fertilizer based on seaweed and other plant extracts but is having some secondary properties also like bio-stimulant, fungicide and pesticide. In a case involving a similar product named 'Nim Sona', the Hon'ble Tribunal in the case of Commissioner v. Kishan Brothers – 2007 (218) ELT 623 (Tri.-Kokata) held that a product having a secondary insecticide property in addition to its basic property as fertilizer is to be considered as an organic manure. The product Vakil-3D is a vegetable fertilizer though having some secondary properties like larvicides, fungicides and pesticides. Thus the demand is not sustainable. Hon'ble CESTAT in catena of cases has held that goods cannot be classified on the basis of use claimed by manufacturer in advertisement. Therefore, the usage as per website of the appellant being made the sole basis for classification of Vakil-3D is not correct without the actual composition of the product. Further, the demand is also time-barred.

5) **Best Agri Products (B.A.P.),** a manure based soil conditioner fertilizer was classified by the appellant under CSH 31.05 and Central Excise duty of Rs.39,762/- 1 in terms of Notification No.12/2012-CE dated 17/03/2012 during the year 2014-15. The department raised a dispute that this product was classifiable under CH 38.24. Later on receipt of certificate dated 26/09/2014 from Agriculture department certifying the product in question as an organic fertilizer, the appellant claimed classification under CH 31.01 and hence the dispute is regarding classification of the product under CH 31.01 or CH 38.24. A demand of Rs.1,24,35,837/- for the years 2011-12 to 2014-15 has been raised on the ground that the Agriculture Department *vide* its letter dated 13/06/2011 did not allow the appellant to sell the product B.A.P. as fertilizer; that HSN CH 31.05 excludes a prepared plant growing media such as potting soils, based on peat or mixtures or peat and sand or of peat or clay (heading 27.03) and mixture of earth, sand, clay etc. (38.24) and HSN CH38.24 includes a prepared plant growing media such as potting soils, consisting of products classifiable under Chapter 25. Relying on the test report of Chemical Examiner, department has held that the test report showing presence of only small quantity of nitrogen, phosphorous and potassium is not classifiable under Chapter 31. The product is soil conditioning fertilizer, being referred to in the invoices as soil conditioner. The Agriculture department had never denied or disputed its status as an organic Fertilizer. The Apex Court in the case of Indo International Industries v. CST – 1981 (8) ELT – 325 (SC) held that in interpreting items in statutes like Excise Act or Sales Tax Act, where diverse products, articles and substances are classified, resort should be had, not to the scientific and technical meaning of terms and expressions used, but to their popular meaning i.e. the meaning attached to them by those dealing with them. The product B.A.P. is not a prepared binder for foundry moulds or cores. It is also not a chemical product or preparation of the chemical or allied industries as it is used in agriculture and not in industry. The department has confused the expression 'plant growth promoter' with the expression 'mixture used as plant growing media, such as potting soil, consisting of products classifiable in Chapter 25 (earth, sand, clay)`. The product 'B.A.P.' is essentially manufactured with city compost / cow dung, it is a fertilizer of animal or vegetable origin. The Agriculture department has also issued certificate dated 26/09/2014 recognizing the product 'B.A.P.' as an organic fertilizer. The demand of Rs.1,24,35,837/- raised in respect of the product 'B.A.P.' is not sustainable on merits and it is also time-barred.

6) **Sikko Power** was classified by the appellant during the year 2014-15 under Chapter heading 31.05 of CETA, 1985 and paid duty of Rs.5,409/- @ 1% under Notification No.12/2012 dated 17/03/2012. The department disputed this classification and has classified the Sikko Power under Chapter heading 38.24 of CETA, 1985 and issued a demand of Rs.2,97,970/- for the year 2011-12 to 2014-15 on the ground that the Agriculture department *vide* letter dated 13/06/2011 did not allow the appellant to sell the product as fertilizer; HSN Chapter heading 31.05 excludes a prepared plant growing media such as potting soils, based on peat or mixture of peat and sand or of peat or clay (heading 27.03) and mixture of earth, sand, clay etc. and that HSN Chapter heading 38.24 includes a prepared plant growing media such as potting soils, consisting of products classifiable under Chapter 25. The product is question is being sold as soil conditioner covered under CETH 3105. Soil conditioning fertilizer is also one of the species of fertilizer. The Hon'ble Supreme Court in the case of GSFC v. Collector – 1997 (91) ELT-3 (SC) have held that fertilizer is a genus which may consist of various species of fertilizers, namely chemical fertilizer, soil fertilizer, animal or vegetable fertilizers. The department has relied upon the test report to claim that the said product is a plant growing media though the test report does not say anything to that effect and asks the department to ascertain its use. The product Sikko Power is rightly classifiable under Chapter 31.05 and not under 38.24 as decided by the adjudicating authority. Moreover the demand of Rs.2,97,970/- is time barred.

7) **Sikko Bio Star** was classified by the appellant under CH 31.05 by the appellant during the year 2014-15 as organic manure based soil conditioner fertilizer and paid Rs.21,011/- @1% in terms of Notification No. 12/2012-CE dated 17/03/2012. The department disputed this classification and confirmed classification under Ch 38.24 even after receipt of certificate dated 26/09/2014 from the Agriculture department certifying the product Sikko Bio Star to be organic fertilizer. The product 'Sikko Bio Star' is a manure-based organic soil conditioning fertilizer consisting of city compost / cow dung and additives. The Chemical Examiner's report dated 11/08/2014 mentions that such products find use as potting soil, (Plant growing media). The appellant had brought to the notice of the learned Adjudicating Authority that the Agriculture Department, Gujarat State, recognizes the said product 'Sikko Bio Star' as an organic fertilizer as is evident from the certificate dated 26/09/2014. The appellant had explained that the product 'Sikko Bio Star' is organic soil conditioning fertilizer and it is being referred to in the invoices as Soil conditioner. Organic soil conditioning fertilizer is also one of the species of fertilizer. As the department had relied on the Test Report, the appellant was entitled to cross-examine the Chemical Examiner.

8) **Sikko Gold** was classified during the year 2014-15 by the appellant as a natural soil conditioning fertilizer used for improving fertility of soil under CH31.05 of CEAT, 1985 and paid Central Excise duty of Rs.5,096 @1% under Notification No. 12/2012-CE dated 17/03/2012. The department raised a dispute and classified the product under CH38.24. Department's stand was that the Agriculture department *vide* letter dated 13/06/2011 did not allow the appellant to sell Sikko Gold as fertilizer; that HSN CH 31.05 excludes a prepared plant growing media such as potting soils, based on peat or mixtures of peat and sand or of peat or clay and that HSN CH38.24 includes a prepared plant growing media such as potting soils, consisting of products classifiable under Chapter 25. The appellant contends that Sikko Gold is a natural soil conditioning fertilizer used for improving fertility of soil and was made out of natural ingredients like dolomite, bantonite clay, gypsum powder, magnesium sulphate / slug, natural rock phosphate, city compost / cow dung and sea weed for its manufacture. The Chemical Examiner in his test report had stated that such products find use as potting soil (plant growing media). It seems the learned Chemical Examiner is not aware that Potting Soil is a medium which is used to grow plants, herbs and

vegetables in a pot or other durable container whereas Sikko Gold is not meant for use as potting soil but as soil conditioning fertilizer in agriculture. Thus the appellant wanted to cross-examine the Chemical Examiner to prove that his observation was without merit and made in a casual manner. The Agriculture department had never denied or disputed it status as a fertilizer. There was no willful non-declaration or mis-declaration or suppression of facts by the appellant so as to attract the extended period of limitation. The appellant submits that the learned adjudicating authority had failed to appreciate that the appellant was under *bona fide* that since they were manufacturing animal or vegetable origin fertilizer, no Central Excise duty was payable by them. The appellant submits that the demands are not sustainable on merits and are time-barred. As such no penalty either under Rule 25 of CER, 2002 or under Section 11Ac of CEA, 1944 was imposable but a penalty of Rs.84,80,082/- was imposed unlawfully by the adjudicating authority.

7. In the appeal filed by Shri Jayanti Mohanbhai Kumbhani, Managing Director of the appellant, it has been submitted that the grounds of appeal filed by the appellant be treated as part of his appeal. He has contended that the allegations that he had concerned with goods which he knew or had reasons to believe were liable for confiscation are extremely vague and does not specify as to in what manner he had concerned himself. There was absolutely no evidence relied upon in the SCN to support this allegation. The Hon'ble CESAT in the case of CCE & CC BBSR-I v. Pentagon Steel)P) Ltd. – 2013 (288) ELT 271 (Tri.-Kokata) agreed with the finding of the learned Commissioner (Appeals) that in absence of involvement of the Managing Director in the clandestine removal of goods, no personal penalty under Rule 26 of CCR, 2002 is imposable on him. Similar view has been held in Garware Synthetics v. CCE, Pune – 2000 (116) ELT 608 (Tribunal); Bihar Extrusion Co. (P) Ltd. v. C.C.E. – 1991 (56) ELT 139 (T); Marks Engg. Pvt. Ltd. v. CCE, Kolhapur – 2014 (311) ELT 78 (Tri.-Mumbai) and many more such decisions. He further submits that the department had miserably failed to bring on record specific allegation or evidence of his personal role in the alleged violation and yet wrongly imposed a very harsh penalty of Rs.25,00,000/- on him under Rule 26 of CER, 2002, that is required to be set aside.

8. Personal hearing was held on 05/10/2017. Shri Madanlal Mandar, Consultant appeared on behalf of the appellant as well as Shri Jayanti Mohanbhai Kumbhani, Managing Director of the appellant. The learned Consultant reiterated the grounds of appeal. He also made additional submissions.

9. I have carefully gone through the contents of the impugned order as well as the grounds of appeal filed by the appellant and Shri Jayanti Mohanbhai Kumbhani, its Managing Director (hereinafter referred to as 'the Managing Director'). The dispute pertains to classification of the appellant's products viz. (i) Vasool; (ii) Black Surya; (iii) Vakil-3D; (iv) Best Agri Product (B.A.P.); (v) Sikko Power; (vi) Sikko Bio Star and (vii) Sikko Gold manufactured by the appellant and the confirmation of demand of Central Excise duty invoking extended period, the confirmation of interest and the imposition of penalty on the appellant under Section 11AC of CEA, 1944 and personal penalty on the

Managing Director under Rule 26 of CER, 2002. The discussion with regards to classification and confirmation of demand of duty and interest is taken up for each of the product separately in the following paragraphs.

10. The classification of the product **'Vasool'** has been confirmed under CETH 31051000 of CETA, 1985 in the impugned order on the basis that the product is sea weed extract in the packings of 4kgs and 10kgs attracting duty @ 1% that was not paid by the appellant. The adjudicating authority has confirmed the classification of the product 'Vasool' under CETH 31051000 of CETA, 1985 holding that this classification was not disputed and has confirmed the demand for duty accordingly. He has highlighted the submission of the appellant that it was a *bona fide* mistaken interpretation with regards to classification under CETH 310501000 on its part to hold that this classification was not disputed. The appellant has reiterated these submissions in the grounds of appeal admitting that there was a *bona fide* mistake of interpretation with regards to CETH 31051000 of CETA, 1985 but the confirmation of demand has been challenged on the grounds of limitation. Therefore, I find that with regards to the classification of the product 'Vasool', the order of the adjudicating authority classifying the same under CETH 31051000 of CETA, 1985 is required to be upheld as correct and valid. On considering the aspect of limitation, it is seen that the appellant has challenged the confirmation of demand based on limitation by relying on the case laws in the matter of Cosmic Dye Chemical V. Collector of Central Excise, Bombay – 1995 (75) ELT 721 (SC); Collector of Central Excise v. Chemphor Drugs & Liniments – 1989 (040) ELT 0276 (SC); CC&CE, Hyderabad-IV v. ITW Signode (India) Ltd. – 2015 (322) ELT 699 and Janta Rubber Distributors v. CCE, Calcutta-I – 2000 (125) ELT 671 (Tribunal). The two citations covering orders of Hon'ble Supreme Court is clearly distinguishable on facts because, in those cases the Apex Court was not dealing with a situation where the petitioners had not obtained registration. The case law in the matter of CC&CE, Hyderabad-IV v. ITW Signode (India) Ltd. – 2015 (322) ELT 699 is also distinguishable because the respondent was holding Central Excise Registration and the issue of limitation in that case was arising out of valuation dispute. In the matter of Janta Rubber Distributors, the dispute was regarding the denying of the SSI exemption benefit under Notification No. 175/86-CE dated 01/03/1986 as amended by Notification no.223/97-CE dated 22/09/1987, which is distinguishable on facts from the instant case. The situation in the present case, where the appellant had not obtained Central Excise registration and had not filed periodic returns is aptly covered under the majority decision in the case of TATA STEEL LTD. vs COMMISSIONER OF SERVICE TAX, MUMBAI-I – 2016 (41) S.T.R. 689 (Tri.-Mumbai), as evident from the extracts reproduced as follows:

"Further, **it is observed that the appellant did not take any registration for the said service and no returns were filed for the relevant period and in the absence of the**

information either from the return or submission from the appellant it is practically not possible for the department to issue show cause notice. In view of the above factual matrix it is not possible to accept the contention that the appellant had a *bona fide* doubt. In my view, even if they had a *bona fide* doubt, they should have provided the precise information in July, 2007 itself so that the show cause notice could have been issued within the normal period of limitation. I also find that the Member (Judicial) has observed that the information was available in the balance sheet, etc. In my considered view, the information should be provided to the concerned jurisdictional assessing authority. The balance sheet may be providing some details but these generally do not provide the precise details to enable the department to issue demand notice. In any case the balance sheet may be a public document but the question is whether the balance sheet or information was given to the assessing authorities. In the present case, the appellants did not provide the information in July, 2007. They did not pay the tax as per the direction of the letter dated 27-8-2007. Under the circumstances, I am of the view that the relevant information was suppressed from the department and extended period of limitation has been correctly invoked."

Relying on the above ratio it is seen that the appellant having not obtained Central Excise registration and having not filed periodical returns, its activities remained suppressed from the department until the same was unearthed by way of investigation. The department had no means to know about the *bona fide* mistake of interpretation pleaded by the appellant at the adjudication and appellate stages. Therefore, the invoking of extended period for confirming the demand of duty is legally correct and justified in the present case. The confirmation of demand for duty and interest is sustainable with regard to this product and the same is upheld. Further, it is seen that the appellant has relied on the same set of decisions to challenge the confirmation of demand in the matter of the other products also. For the sake of avoiding repetition, it is held that the above discussion and findings with regards to limitation holds good for all the products where the appellant has challenged confirmation of demand on the grounds of limitation relying on the same citations and it is held that the challenge fails as these case laws are factually distinguishable in as much as in the present case the appellant had not obtained registration and had not filed statutory returns.

11. The department has classified **N.P.K.20:20:20, N.P.K.20:10:10, N.P.K.12:32:06** under Chapter Heading 31052000 and has demanded duty of Rs.5,37,353/- for the period 2011-12 to 2014-15. The appellant has not disputed the classification in the grounds of appeal but pointed out that there was a differential amount of Rs.6,362/- confirmed in the impugned order that it does not wish to contest. However, it has strongly pleaded in the grounds of appeal that the demand of Rs.5,43,715/- is time-barred as there was no willful non-declaration or mis-declaration or suppression of any fact by the appellant. The plea of limitation is not sustainable in view of the discussion regarding the same in paragraph 10 *supra* and hence confirmation of demand and interest with regard to this product in the impugned order is liable to be upheld.

12. As far as the product **Black Surya** is concerned, the adjudicating authority has held that since products of Chapter 31 in any packaging not exceeding gross weight

10kgs are classifiable under CTSH 31051000, duty is chargeable on such products and has confirmed the demand, along with interest. It is the argument of the appellant that such a classification would be valid only if the product was manufactured in India and since it was importing the product on payment of Customs duty and repacking the same into smaller packages, the same did not amount to manufacture under Section 2(f) of CEA, 1944. On considering this argument, it is seen that the same is erroneous because the definition of manufacture as per Section 2(f) (iii) covering the process of packing or repacking does not differentiate goods procured from the domestic market from imported goods. Thus there is no scope to hold that the impugned activity of the appellant does not amount to manufacture. Further, limitation cannot be applied to the demand of duty in relation to this product as per the discussion in paragraph 10 *supra* in view of the fact that the appellant had failed to obtain registration and file statutory returns with regards to 'Black Surya'. The confirmation of demand and interest on the product **Black Surya** is hereby upheld.

13. On considering the product **Vakil-3D** it is seen that the adjudicating authority has confirmed the classification of this product under CETH 3808 of CETA, 1985 holding that as per the description of the product appearing the website of the appellant, the primary function was that of larvicides for controlling various types of diseases and stimulate growth of plant and flower. The argument of the appellant is that the product is basically a vegetable fertilizer classifiable under Chapter CSH 31010099 of CETA, 1985 attracting Nil rate of duty and is having secondary properties like bio-stimulant, fungicide, pesticide etc. The appellant has relied on the decision of Tribunal in the case of Commissioner v. Kishan Brothers – 2007 (218) E.L.T. 623 (Tri.Kolkata). However, on studying this case law it is seen that Hon'ble Tribunal has clearly relied on the fact that the Department of Plant protection, Quarantine and Storage, Ministry of Agriculture had refused to register the product in that case as insecticide considering it as organic manure. In the present case, there is no such evidence produced by the appellant to prove that the product Vakil-3D was basically organic manure. Therefore, I find no reason to interfere with the classification of this product as well as the duty and interest confirmed in the impugned order. As regards the plea that the demand is time-barred, I find that the same is not sustainable in view of the discussion in paragraph 10 supra. The classification as well as the confirmation of duty and interest with regards to **Vakil-3D** is upheld.

14. With regards to **Best Agri Products (B.A.P.)**, the appellant seeks classification under CETHSH 31052000 of CETA, 1985 and claims the benefit of Notification No.12/2012-CE on the basis of certificate of manufacture dated 26/09/2014 issued by Joint Director of Agriculture (Ext.), Ahmedabad Division, Ahmedabad for "ORGANIC FERTLIZER City Compost (1) (B.A.P) (2) BIO STAR". The adjudicating authority has discussed this certificate in paragraph 66.4.4 of the impugned order holding that the

product 'City Compost B.A.P'. was different from the product 'B.A.P.' that had been denied permission to be sold as fertilizer, along with other products of the appellant, *vide* letter dated 13/6/2011 of the Deputy Director of Agriculture (QC), Gujarat State, as such products did not belong to the Schedule I, Part (A) of Fertilizer (Control) Order, 1985 as per the existing policy of Government of India. The appellant has not produced any clarification from the Directorate of Agriculture, Gujarat State clarifying that both the products are one and the same. The appellant has not referred to any reason furnished by the Directorate of Agriculture to evidence as to why they had subsequently overturned or revised the decision to deny permission for 'B.A.P.' to be sold as fertilizer. The adjudicating authority has raised a genuine concern that the product *'B.A.P.'* denied permission as fertilizer was different from the product *'City compost B.A.P.'* for which permission was available to be sold as fertilizer. In the grounds of appeal the appellant has cast the onus on the department to obtain the requisite clarification from the Directorate of Agriculture, Gujarat State regarding this concern. This argument of the appellant is neither justified nor valid because it is settled law that the onus to prove eligibility always lies with the person who is claiming the benefit of exemption or concessional duty. There is no evidence adduced by the appellant that *'City compost B.A.P.'* and *'B.A.P.'* are not different but the same product. Further, the adjudicating authority has relied on the test report of the Chemical Examiner establishing that 'B.A.P.' was soil conditioner as it consisted of micro nutrients like Humic Acid, Fulvic Acid, Calcium carbonate, Nitrogen, Phosphorous, Potassium etc. The appellant has not countered this test report with any test report of their own to show that the Chemical Examiner had faltered in arriving at conclusion in the said test report. At the same time the adjudicating authority is correct in relying on the unretracted statement of the Managing Director of the appellant endorsing the Technical Information of the product where with regards to its application and method of use, it has been specifically stated that the said product is used as SOIL CONDITIONER FOR SOIL APPLICATION. The adjudicating authority has also relied on Circular No.1022/10/2016-CX. dated 06/04/2016 where it was clarified that sale of micronutrients as 'micronutrient fertilizer' would not lead to classification thereof as fertilizers under Chapter 31 of CETA, 1985 and that where the essential constituent giving character to the mixture is one or more of the three elements namely Nitrogen, Phosphorous or Potassium, the mixture shall be classified under any of the heading of Chapter 31, depending upon its composition and on the other hand, where the essential character of the product is that of mixture of micronutrients / multi-micronutrients having predominantly trace elements, it shall be classified under CETH 3824 as chemical products not elsewhere specified or included. The appellant has failed to challenge the test report of the Chemical Examiner stating that the product consisted of 1.1% of Nitrogen; 0.27% of Phosphorous and .05% of Potassium, among other constituents, showing that the essential constituent giving character to the product was not a mixture of one or more of the three elements namely

Nitrogen, Phosporous or Potassium, meriting classification under Chapter 31 of CETA, 1985. The appellant has thus failed to substantiate its claim for classification of **Best Agri Products (B.A.P.)** under Chapter 31 whereas the classification of this product under CETH 3824 by the adjudicating is correctly based on C.B.E.C. Circular No.1022/10/2016-CX dated 06/04/2016 is based on the test report, the statement of the Managing Direct and the clarification given in the C.B.E.C. Circular. As regards the claim of the appellant that the demand is time-barred, the discussion in paragraph 10 above is directly applicable to this product also and in a scenario where the appellant had failed to obtain registration and not filed periodic returns, the invoking of extended period for confirming demand is sustainable. Therefore, I uphold the confirmation of demand of duty and interest in the impugned order in respect of the product **B.A.P.**

15. **Sikko Power** was a product of the appellant that it had classified under CETSH 31052000 thereby claiming the benefit of Notification No. 12/2012-CE (NT). In the impugned order the classification of the product has been confirmed under CETSH 38249090 of CETA, 1985 on the ground that the Directorate of Agriculture, Gujarat State, *vide* letter dated 13/06/2011 had denied permission to 'Sikko Power' (soil conditioner) containing Gypsum (granules) to be sold as fertilizer. The adjudicating authority has also relied on the test report given by the Chemical Examiner to the effect that *"the sample was in the form of brown coloured granules composed of Sulphates and Carbonate of calcium along with Siliceous Matter loss on ignition = 25.7%"* and held that 'Other fertilizer' falling under CH 3105 applies only to products of a kind used as fertilizers and containing, as an essential constituent, at least one of the fertilizing elements viz. Nitrogen, Phosphorous or Potassium, whereas the product Sikko Power was nothing but plant growing media. The appellant has contended in the grounds of appeal that the department had relied upon the test report to wrongly claim that 'Sikko Power' was a plant growing media even though the test report does not say anything to that effect. However, the appellant has not produced any evidence in the form of any alternate test report or certificate from competent authority to show that the test report was not correct or that the product was actually a fertilizer. Instead, the appellant has simply asserted that 'Sikko Power' is a soil conditioning fertilizer. The appellant has also challenged the confirmation of demand on the ground of limitation, which is not valid or sustainable in view of the discussion in paragraph 10 *supra*. The invoking of extended period is correct and justified. The classification of 'Sikko Power' as well as the duty and interest on this product confirmed in the impugned order is correct and is accordingly upheld.

16. Another product manufactured and cleared by the appellant where the classification was disputed was **Sikko Bio Star.** The classification claimed by the appellant for this product under CETSH 31052000 of CETA, 1985 for availing benefit of Notification No.12/2012-CE has been denied by the adjudicating authority, who has

confirmed classification of this product under CETSH 38249090 of CETA, 1985. The adjudicating authority has relied on the letter dated 13/06/2011 issued by the Directorate of Agriculture, Gujarat State wherein Sikko Bio Star (Soil Conditioner) containing N:1.5% to 2.5%, K20:1.9% to 2.5% and P20: 1.5% to 2% was rejected permission to be sold as Fertilizer. The appellant authority has also relied on the test report issued by Chemical Examiner holding that based on its constituents, 'Sikko Bio Star' find use as potting soil (Plant growing media). The adjudicating authority has also relied on the unretracted statement of the Managing Director dated 15/03/2014 endorsing the technical detail, inter alia, that the application and method or use of the said product in terms of agriculture field application is as SOIL CONDITIONER FOR SOIL APPLICATION. The appellant has challenged the classification confirmed in the impugned order and has contended that 'Sikko Bio Star' is a manure based organic soil conditioning fertilizer, which is one of the species of fertilizers. However, the appellant has not produced any evidence to challenge the test report that clearly states that the test for Nitrogen, Sulphur and Potassium shows negative presence. The Directorate of Agriculture, Gujarat State had clearly rejected permission for the said product to be sold as fertilizer in its letter dated 13/06/2011. However, the appellant relies on another letter of the same Agency dated 25/09/2017 granting permission for manufacture of physical organic fertilizer *'City Compost 'Bio Star''*. The appellant has not produced any evidence to show that 'Sikko Bio Star' was the same as 'City Compost Bio Star'. Instead, the veracity of the test report has been challenged and the rejection of opportunity by the adjudicating authority to cross-examine the Chemical Examiner has been contested. In this regard I find that when the appellant has not produced any alternate test report or documentary evidence with different set of specifications as compared to the test report showing that the constituents of the said product made it a fertilizer, no purpose would have been served by cross-examining the Chemical Examiner. Even in the grounds of appeal the appellant has not adduced any evidence to question the veracity of the test report. The argument that City Compost / Cow Dung used in the product would make it organic manure based soil conditioner would not grant the product the status of fertilizer for the purpose of classification under CETA, 1985, especially in view of the unretracted statement of the Managing Director dated15/03/2016 relied upon in the impugned order stating that City compost / cow dung was being used as fillers. The clarification under C.B.E.C. Circular No.1022/10/2016-CX dated 06/04/2016 clearly specifies that the essential constituent giving character to the product should be a mixture of one or more of the three elements namely Nitrogen, Phosphorous or Potassium to merits its classification under Chapter 31 of CETA, 1985. In the present case the adjudicating authority has relied on the test report showing negative presence of all these three elements whereas the appellant has not produced any evidence to the contrary. Therefore, the classification of the product confirmed in the impugned order along with confirmation of duty and interest, in respect of **Sikko Bio Star** is liable to be upheld. The

appellant has raised the issue of limitation, which is a futile attempt because the manufacturing and clearance of the said product carried out by the appellant without obtaining registration and its failure to file returns amounts to suppression of facts leading to evasion of duty that would have continued if the investigation was not initiated by the department to unearth the evasion.

17. For its product **Sikko Gold** the claim of the appellant for classification under CETSH 31052000 and thereby claiming the benefit of Notification No.12/2012-CE (NT) has been denied in the impugned order where the classification has been confirmed under CETSH 38249090 of CETA, 1985. The adjudicating authority has relied upon the letter dated 13/06/2011 issued by the Directorate of Agriculture Gujarat State was denied permission to be sold as fertilizer. The adjudicating authority has also relied on the test report given by the Chemical Examiner stating that the said product find use as potting soil (Plant Growing media). Further, the adjudicating authority has held that the product Sikko gold containing CA + Mg + S is similar to the product manufactured by M/s Manisha Agro Science, Solapur, Maharashtra that has been specified by the Directorate of Agriculture (I & Q.C.), Pune as Secondary Nutrient Mixture that according to the adjudicating authority is multi micro nutrients falling under CETSH 38249090 as per the clarification of C.B.E.C. Circular No.1022/10/2016-CX dated 06/04/2016. In the grounds of appeal the appellant has contended that 'Sikko Gold' is a natural soil conditioning fertilizer used for improving fertility of soil and was made out of natural ingredients like dolomite, bantonite clay, gypsum powder, magnesium sulphate / slug, natural rock phosphate, city compost / cow dung and sea weed. The appellant has also sought to counter the Chemical Examiner's conclusion in the test report that the said product find use as potting soil (plant growing media). The appellant contends that the learned Chemical Examiner was not aware that Potting Soil is a medium which is used to grow plants, herbs, vegetables in a pot or other durable container whereas 'Sikko Gold' is meant for use as soil conditioning fertilizer and hence the appellant wanted to cross-examine the Chemical Examiner. The denial for cross-examination of the Chemical Examiner by the adjudicating authority is proper in view of the fact that the appellant is not producing any evidence in the form of laboratory test report by any other laboratory or agency or documents of chemical specifications of the product to counter the results derived by the Chemical Examiner and therefore, such findings in the test report could not have been annulled or revised by way of cross-examination. The appellant has also challenged the confirmation of demand on the grounds of limitation. It is an admitted fact on record that even though there were reasons for the appellant raising suspicion that the said product was not fertilizer; the appellant had neither sought any clarification from the department nor obtained Central Excise registration. As discussed in paragraph 10 *supra* the failure to obtain registration for manufacture and clearance of the said product and the failure to file statutory returns showing details of the manufacture and clearance of the said product clearly amounts to suppression of

facts leading to evasion of duty. Therefore, the appeal filed by the appellant fails on merits as well as on limitation. The classification of **Sikko Gold** confirmed in the impugned order along with the demand for duty and interest confirmed in respect of the product **Sikko Gold** is hereby upheld.

18. Now I take up the the invoking of extended period of demand and the imposition of penalty on the appellant and the Managing Director in the impugned order. It is on records that the Directorate of Agriculture, Gujarat State, which is a statutory body of the Government of Gujarat, had, as back as on 13/06/2011 denied permission for the impugned products manufactured by the appellant to be cleared / sold in the market as 'Fertilizer'. The appellant had no reason whatsoever to continue treating the impugned products as fertilizers for the purpose of classification under CETA, 1985. There was no scope for the appellant to avail undue benefit of exemption or concessional duty wrongly under various Notifications, treating the impugned goods as fertilizers. The appellant had never sought any clarification from the department or intimated the department regarding the denial of permission by the Directorate of Agriculture, Gujarat State for the impugned goods to be sold as fertilizers. Therefore, the fact that the appellant had failed to apply for and obtain Central Excise registration for manufacture of the impugned products clearly indicates suppression of facts with intent to evade Central Excise duty. The mis-classification of the impugned goods treating them as various forms of fertilizers amounts to mis-declaration with intent to avail undue benefit and evade payment of duty. Further, in the absence of registration and in view of the fact that the statutory returns were not filed by the appellant; the facts remained suppressed from the department leading to evasion of duty. In such a scenario, all the contraventions of the provisions of CEA, 1944 and the rules made thereunder by way of omissions and commissions on part of the appellant were done with intent to evade duty Accordingly, the invoking of extended period of demand in the present case is legally just and correct. It is a fact on record that even after the appellant had obtained Central Excise registration it was only because of the detailed investigation on part of the department that the evasion of Central Excise duty by the appellant could be unearthed. The ingredients for invoking extended period of demand are similar for the imposition of penalty under Section 11AC of CEA, 1944. Hence the imposition of penalty on the appellant is legally sustainable in the present case. As regards the penalty imposed on the Managing Director under Rule 26 of CER, 2002, it emerges from his statements that he had concerned himself with the possession, transportation, removal, concealment and selling of goods that he had reason to believe were liable to confiscation on clearance without payment of duty especially in view of the denial of permission for such goods to be sold as 'fertilizer' by the Directorate of Agriculture, Gujarat State. Therefore, the penalty on Shri Jayantibhai M. Khumbhani, Managing Director of M/s Sikko Industries imposed in the impugned order is also upheld as correct and legally sustainable.

19. In view of the above discussions, I uphold the classification of the impugned products finalized by the adjudicating authority. The confirmation of the demand of duty and the appropriation of deposits made by the appellant towards duty liability is also upheld as just and proper. I also uphold the recovery of interest and appropriation of the deposits made by the appellant towards interest liability ordered in the impugned order. I also uphold the imposition of penalty on the appellant and on the Managing Director. Both the appeals are rejected.

7. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in the above terms.

(उमा शंकर)
आयुक्त
केन्द्रीय कर (अपील्स)

Date: / /2017

Attested

(K.P. Jacob)
Superintendent,
Central Tax (Appeals),
Ahmedabad.

By R.P.A.D.

To

1. M/s Sikko Industries Ltd.,
   508, "Iscon Elegance", Near Jain Temple,
   Near Prahlad Nagar Pick Up Stand,
   S.G. Highway, Vejalpur,
   Ahmedabad – 389 951.

2. Shri Jayantibhai M. Kumbhani,
   Managing Director, M/s Sikko Industries Ltd.,
   508, "Iscon Elegance", Near Jain Temple,
   Near Prahlad Nagar Pick Up Stand,
   S.G. Highway, Vejalpur,
   Ahmedabad – 389 951.

Copy to:

1. The Chief Commissioner of C.G.S.T., Ahmedabad.
2. The Commissioner of C.G.S.T., Ahmedabad (North).
3. The Additional Commissioner, C.G.S.T (System), Ahmedabad (North).
4. The A.C / D.C., C.G.S.T Division: III, Ahmedabad (North).
5. Guard File.
6. P.A.